SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71 - 183

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTE, PATRICK PATENCIO, and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted Land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Plaintiffs,

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

Defendant.

AMICUS CURIAE BRIEF ON BEHALF OF THE MESCALERO APACHE TRIBE, OF NEW MEXICO.

FETTINGER & BURROUGHS

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AMICUS CURIAE BRIEF ON BEHALF OF THE MESCALERO APACHE TRIBE, OF NEW MEXICO.

Pursuant to Rule 42(2) and the written consent of all parties hereto, the Mescalero Apache Tribe, of New Mexico, does hereby file this Brief as Amicus Curiae.

Interest of Amicus Curiae.

The Mescalero Apache Tribe is an Indian Tribe organized pursuant to federal legislation and functioning under Federal control. As in the case of other developing Tribes, the growth of the Mescalero Apache Tribe is geared to economic development of enterprises on and near Indian lands. These lands, held in trust by the United States for the Indian beneficiaries, must be developed and protected if the Indian people are to survive. The threat to stifle the progress of the Agua Caliente Band of Mission Indians by the State of California looms as a threat to the economic security and growth of the Mescalero Apache Tribe.

The steps to Indian economic development are plagued by state and local efforts to tax Indian interests. The harder the Indians work at developing self-reliance, the harder the efforts of the state and local governments to circumvent the sovereignty of the Tribe and tax these efforts. These taxes are a direct threat to the tools of economic progress, and such taxes can destroy the structure of Tribal sovereignty, for the Agua Calientes and for other Indian Tribes.

As an American Indian Tribe, the Mescalero Apaches accordingly have a vital interest in the present case.

Questions Presented.

The primary question presented here is whether Riverside County, a political subdivision of California, can impose a possessory interest tax on leases of land on an Indian reservation where the lands are held in trust by the United States of America as Trustee, for the sole use and benefit of the Indians?

ARGUMENT.

I.

The State of California has no Authority to Apply its Possessory Interest Tax to Indian Land Still Held in Trust by the United States.

A. Article I, Section 8, Clause 3 of the United States Constitution vests exclusive jurisdiction over Indian Tribes in the Federal Government.

The United States has controlled Indian relations through the powers established in the commerce clause, U. S. Constitution, Article I, Section 8, Clause 3. It is this regulatory power that was utilized for many years to pre-empt state control of liquor sales to Indians, on and off the reservation. *United States v. Holliday,* 70 U.S. 407, 18 L.-Ed. 182 (1866). This Court in *Holliday,* supra., held that any commerce with Indians was subject to regulation by Congress, and the locality or extent of traffic cannot effect the power. Just as liquor merchants could not circumvent the control of the commerce clause by moving their sales off the reservations, neither can the State of California circumvent federal control by calling the tax a tax on the possessory interest. For though the tax is not directly on the Indian, its result has a direct economic reflection on the Tribe. It was the resultant harm to Indian beneficiaries that caused this Court in *Holliday* to remove all liquor from the control of the states where it could influence Indians. Just as Congress previously extended federal control over all liquor on or near reservations to protect its beneficiaries whenever the interest of trade or commerce required, Congress has now extended its control over Indian economic efforts to the exclusion of state and local government. This control applies whether the economic effort is carried on directly by the Indian or through a lessee, as the result to the Tribe is the same.

Pertinent sections of United States Code, Title 25 indicate continued federal control in the tax area. 25 U.S.C., Section 1322(b) states in part:

> "Nothing in this section shall authorize the alienation, encumbrance or taxation of any real or personal property, . . . belonging to any Indian or Indian Tribe, . . . that is held in trust by the United States are subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, . . . the ownership or right to possession of such property or interest therein."

This and other code sections dealing with federal tax control have been implemented by 25 C.F.R., Section 1.4.

United States v. Rickert, 188 U.S. 432, 441, S.Ct. 478, 47 L.Ed. 532, 538 (1903), establishes certain basic concepts of Indian tax law, "But, as already said, no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians." In one sentence, this Court has summed up a basic premise that must be applied to all Indian tax questions: That the United States has a trust duty to Indian Tribes and therefore will exclude the states from taxing the land and interest of the Indians.

A review of the case law, the federal statutes and regulations, all implementing the commerce clause, indicate the federal government has taken the question of taxation of Indian interests under

its jurisdiction and has precluded the state, under any taxing method, from taxing the Indian Tribes.

B. Control of Leasing of Indian Lands Has Been Pre-empted by the Federal Government.

Where the federal government has exercised its power over an area of Indian development, that area is withdrawn from state legislation. *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In *Warren Trading Post,* the State of Arizona was pre-empted from levying a sales tax on Indian traders on sales made to reservation Indians because of federal legislation and regulation. In footnote No. 18 the Court stated as follows:

> "Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because these activities take place on a reservation, but rather because Congress in the exercise of its power, granted in Article I, Section 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the states to legislate on the subject. Cf. Surplus Trading Co. v. Cook, 281, U.S. 647, 651, 74 L.Ed 1091, 1094, 50 S.Ct. 455."

The amount of legislation concerning regulation of Indian traders is an insignificant portion of the federal legislation pertaining to Indian Tribes as set forth in United States Code, Title 25 and 25 C.F.R.

The federal control over leasing, as utilized in the present case, is of far greater control than that exercised in *Warren Trading Post v. Arizona Tax Commission,* supra. The requirements of 25 U.S.C. Section 415, 25 C.F.R. 131 and the requirements and control of the Bureau of Indian Affairs, all conclusively indicate that the federal government has taken full control of Indian leases. Such blanket control removes any state application of its taxing power.

II.

The Tribe is Exempt From Taxation Because it is a Federal Instrumentality.

Indian Tribes have been considered governmental instrumentalities for an extended period of time. Federal Indian Law, pp. 472-473, states that an Indian Tribe is an instrumentality and agency of the federal government. This is also the rule as stated in *United States v. Rickert,* 188 U.S. 432, 437-438, 23 S.Ct. 478, 47 L.Ed. 532, 536 (1903):

> "To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race with which this court has said that 'From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this

Court, whenever the question has arisen.' United States v. Kagama, 118 U.S. 378, 384, 30 L.Ed. 228, 231, 6 Sup. Ct. Rep. 1108, 1115."

25 C.F.R. 131 establishes regulations for the leasing of Tribal lands. These regulations were established to implement the duties of the trustee to the beneficiary. Under these regulations, the Tribe becomes the conduit, or instrumentality, in meeting the federal government's obligation to protect and develop the Indian Tribes. All details related to the development of the Indian land, by statute and regulation, must be approved by the federal government.

The Mission Indian Relief Act of 1891, 26 Stat. 712, provided that these lands were to be held "in trust for the sole use and benefit" of the Indian. We suggest that the government has chosen the Tribe as the instrumentality for development of these lands. By carrying out this governmental function, the Tribe has been selected as the instrumentality for meeting the obligation of the government to the Indian people. The control of this instrumentality can be seen by 25 U.S.C. 415 and 25 C.F.R. 131. The selection of the Tribe to carry out this function to promote the economic development of the Tribe cannot expose it to state control. Whether by Bureau of Indian Affairs control or Tribal control, the leasing of Indian lands is performing a government duty and the Indian Tribe constitutes a federal instrumentality fulfilling that duty.

Conclusion.

Indian Tribes to survive must develop economically. Congress has recognized this need for economic development and through statute and regulation has established the various Tribes as federal instrumentalities to carry out its obligations to the American Indian. These needs of the American Indian have been met by utilizing the requirements of the commerce clause, federal statutes and regulations, all to the exemption of any state taxing authority.

Accordingly, the Mescalero Apache Tribe, as Amicus Curiae, respectfully requests that this Honorable Court grant the Agua Calientes' Petition for Certiorari.

Dated: September 1, 1971.

Respectfully submitted,

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